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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

TERRY EWING,

Plaintiff and Respondent,

v.

TRAVIS GREENLEE,

Defendant and Appellant.

A155828

(Alameda County
Super. Ct. No. RG17853865)

In *Ewing v. Greenlee* (Jan. 22, 2018, A151803) [nonpub. opn.] (*Ewing I*),¹ this court reversed a restraining order issued against landlord Travis Greenlee in favor of tenant Terry Ewing. Upon remand, the trial court found that Ewing sought the restraining order in good faith and denied Greenlee’s motion for attorney’s fees pursuant to Code of Civil Procedure section 527.6, subdivision (s).² Greenlee contends the court misapplied the law and abused its discretion. It did not. We affirm.

BACKGROUND

The underlying facts are stated as follows in *Ewing I*:

“Travis Greenlee rented his Oakland house to Terry Ewing under a written lease for month-to-month occupancy. Tenancy began in March 2015.

“Two years later, in March 2017, Ewing petitioned for a civil harassment restraining order. Ewing alleged that in December 2016 he discovered that Greenlee was

¹ We take judicial notice of our opinion in *Ewing I*.

² Further statutory citations are to the Code of Civil Procedure.

storing property in the basement and sometimes stayed there overnight in contravention of the terms of the lease, which give Ewing and his daughter exclusive right of occupancy. Ewing said he told Greenlee not to 'return to the property for reasons other than required maintenance' but Greenlee 'asserts he is only renting a portion of the home to me and insists he has rights to come and go as he pleases with no notification.' Ewing alleges Greenlee 'continues to send me harassing emails and texts telling me he has rights to come into the residence at any time.'

"Ewing twice called the police to remove Greenlee from the premises but the police 'were unwilling to involve themselves in the matter' and told Ewing 'to seek resolution via a court order.' Ewing says Greenlee continued to enter the premises, sometimes accompanied by 'a large dog,' which 'made me uncomfortable challenging Mr. Greenlee further.' Ewing alleges: 'Greenlee's behavior is threatening to myself and my young daughter. His belief in his right to enter our home with no notification nor justified purpose is in violation of our reasonable expectation of privacy within our home. His behavior is threatening, harassing and makes me feel unsafe in the home I rent. I worry he may come at any time and I'm fearful the police have been unable to keep him away.'

"Greenlee filed a written response denying Ewing's claim of harassment and countering that Ewing harassed him by denying him access to the house and reporting him to the police as a trespasser. Greenlee asserts a right to use the attic and basement and says he used those portions of the house throughout the many months of Ewing's tenancy without objection until December 2016. Greenlee asserts: 'I have communicated with [Ewing] in only a civil manner during this dispute' and Ewing's 'claims are landlord/tenant issues, not issues of harassment.'

"A hearing was held in April 2017 at which both Ewing and Greenlee testified. Ewing testified he was entitled to occupy the entire house. Ewing acknowledged a February 2015 oral agreement with Greenlee permitting storage of Greenlee's personal property in the attic and basement but Ewing insisted that storage was to be for a 'very short-term' 'to facilitate moving his stuff out and my stuff in.' He denied any agreement

for long term storage or overnight stays. Greenlee testified that Ewing agreed that the attic and basement were for Greenlee's use throughout the tenancy. Greenlee said that he alone had keys to the attic and basement doors and that Ewing 'never complained' about Greenlee's use of those separate areas until the parties' 'relationship fell apart' in late 2016.

"The court ruled that Greenlee must give Ewing occupancy of the entire house 'as the lease contemplates.' The court issued a three-year restraining order against Greenlee directing him to remove his personal property from the house and to stay away from the house except for 'landlord duties with 24 hours notice.' Greenlee was ordered not to 'harass, intimidate, molest, attack, strike, stalk, threaten, assault . . . or disturb the peace' of Ewing or his daughter and to stay at least 100 yards from their persons, Ewing's workplace, and the child's school. Greenlee was prohibited from possessing firearms or ammunition and the restraining order was registered with law enforcement agencies." (*Ewing I, supra*, A151803 at pp. *1-2.)

Greenlee sought reconsideration of the order, arguing that any harassment was not likely to recur because he had removed his belongings from the building and hired a property manager. The court denied Greenlee's motion, finding his "prior conduct coupled with his continuing interest in the property" indicated that harassment would likely recur in the absence of a restraining order.

This court reversed the restraining order on a narrow ground. We determined the evidence failed to prove a course of conduct that would cause a reasonable person to suffer emotional distress as required for an antiharassment injunction under section 527.6. The dispute between Ewing and Greenlee essentially concerned disputed property rights, not civil harassment, so the proper forum for its resolution was through an unlawful detainer action. (*Ewing I, supra*, A151803 at p. *3.) We therefore reversed the order and directed the trial court to vacate the injunction prohibiting harassment. (*Ibid.*)

After the case was remanded, Greenlee moved the trial court as the prevailing party to recover \$15,000 in pre and post-judgment attorney's fees under section 527.6, subdivision (s) on the ground that Ewing acted in bad faith in, inter alia, pursuing a civil

harassment claim “instead of bringing the appropriate action under landlord tenant law,” doing so without evidence of harassment, and failing to dismiss the restraining order as required by a July 2017 stipulation between the parties in their related unlawful detainer action.

In opposition to the fee motion, Ewing disputed Greenlee’s claim that he sought the restraining order in bad faith. Appearing, as before, in pro per, he asserted: “It’s clear from a casual reading of the [trial court] transcript that I was not allowed to present my entire case and the case was not afforded the proper amount of time to present the evidence. It appears commissioner Hockenhull stopped the case once she had received enough information to grant the restraining order. Had I been allowed to present my entire case, including text messages, additional photographs, emails and letters there would be no doubt to the pattern of harassment by Greenlee.” Ewing attributed his failure to drop the restraining order due to his mistaken belief that it would expire automatically.

The court, Judge Kimberly Colwell presiding, denied the motion. It ruled: “Greenlee is the prevailing party, as he obtained an appellate ruling that the injunction procedure under section 527.6 could not be used to resolve the parties’ dispute in this case. Nevertheless, the court has discretion under section 527.6 to award attorney fees to the prevailing party. The court [is] familiar with the parties’ dispute, having reviewed the pleadings on file in the case and the transcript of the hearing. The court is persuaded that Ewing filed his request for civil harassment restraining order in good faith. Ewing reasonably could have perceived Greenlee’s conduct of accessing the property as conduct designed to annoy or harass [Ewing] and meeting the standard for harassment. The court would act within its discretion to award fees even in the absence of bad faith by Mr. Ewing. However, the court declines to do [so] in this case.”

Greenlee filed a timely appeal from the attorneys’ fees order.

DISCUSSION

Section 527.6, subdivision (s) states that the prevailing party in a civil harassment action brought under the section “may” be awarded attorney fees. The normal rule of

statutory construction is that when the Legislature provides that a court or other decision-making body “may” do an act, the statute is permissive and grants discretion to the decisionmaker. (See, e.g., *Lewis v. Clarke* (2003) 108 Cal.App.4th 563, 569; *Woodbury v. Brown–Dempsey* (2003) 108 Cal.App.4th 421, 433.) Accordingly, the decision whether to award attorney fees to a prevailing party under section 527.6, subdivision (s) will not be disturbed on appeal absent a breach of the trial court’s broad discretion. (*Krug v. Maschmeier* (2009) 172 Cal.App.4th 796, 802.) “Generally, where a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the proper decision for that of the trial judge. The trial court’s exercise of discretion will not be disturbed on appeal in the absence of a clear showing of abuse, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice.” (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682 (*Marriage of Rosevear*).)

Greenlee asserts the trial court abused its discretion because its ruling “is in direct conflict with the findings of the Court of Appeals.” Specifically, he contends our statement in *Ewing I* that there was “insufficient evidence of ‘harassment’ *as statutorily defined*” (italics added) is irreconcilable with the trial court’s finding that Ewing sought the restraining order in good faith. (*Ewing I, supra*, A151803 at p. *2.) But *Ewing I* goes on to observe that “harassment,” as the term is used in section 527.6, “does not encompass a landlord-tenant dispute such as the controversy at issue here.” (*Ibid.*) For that reason, we held, the antiharassment statute does not control an argument over Greenlee’s use of portions of the rented premises. (*Id.* at p. *3) That legal determination has nothing to do with the trial court’s factual finding that Ewing, a non-attorney, could reasonably perceive his landlord’s actions as harassment and on that basis seek a restraining order under section 527.6 in good faith, albeit mistaken under the law.³

³ A misunderstanding that, we observe, was shared by the commissioner who issued the restraining order.

“ ‘ “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” ’ [Citations.] The burden is on the complaining party to establish abuse of discretion. [Citations.] The showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion. [Citations.]” (*Marriage of Rosevear, supra*, 65 Cal.App.4th at p. 682.) This is such a case. Even if we had a different view of the evidence,⁴ we have no authority to reject the trial court’s credibility assessments and factual determinations in favor of our own.

Greenlee also urges us to reverse the attorney’s fee order because, he maintains, Judge Colwell was biased against him. Greenlee first raised this argument in an October 1, 2018 challenge for cause against Judge Colwell under section 170.1, subdivision (a)(6)(iii), in which he alleged that on July 13, 2017, Judge Colwell improperly engaged in ex parte contact with Ewing, referred to photographs (“false evidence”) that were not in evidence, and expressed the belief that Greenlee “ ‘should be in jail for what [he’d] done.’ ” The court struck Greenlee’s challenge for failure to present facts requiring disqualification. Greenlee did not appeal that order to this court, so it is final. To the extent he relies on factual assertions made in his challenge for cause as new evidence of judicial bias supporting reversal of the attorney’s fee order, his reliance is improper. Those assertions are not evidence, and, even if they were, it is beyond this court’s purview to determine their weight and veracity in the first instance. “Conflicts [in the evidence] and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” (*People v. Pearson* (1969) 70 Cal.2d 218, 221.)

⁴ To be clear, we do not.

DISPOSITION

The order denying attorney's fees is affirmed. Ewing is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a).) Ewing's April 25, 2019 motion to strike Greenlee's opening brief on appeal is denied. Ewing's April 25, 2019 request for judicial notice of and motion to correct the record to include the November 19, 2018 order are denied as moot because on January 29, 2019 this court ordered the record augmented to include that order. In all other respects Ewing's April 25, 2019 motion is denied.

Siggins, P.J.

WE CONCUR:

Fujisaki, J.

Wick, J.*

* Judge of the Superior Court of Sonoma County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.